Supreme Court, U.S.
FILED
DEC 27 1995
CLERK

(2)

No. 95-814

In The

Supreme Court of the United States

October Term, 1995

CHARLES ATTEBERRY, *et al.*,

Petitioners,

vs.

THE MAUMELLE COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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16 pp

QUESTION PRESENTED

Did the seller qualify for the exemption found at 15 U.S.C. § 1702(a)(2) under the Interstate Land Full Sales Disclosure Act, 15 U.S.C. 1701 *et seq.* by entering into the contracts involved in this case obligating it to build the homes within two years with the condition that the Purchaser pay for the lot and then the home, if they determined to have the homes built?

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HUD Guidelines, 24 C.F.R. pt. 1710 app. A at IV(b) 2, 4, 5, 11

TO THE HONORABLE SUPREME COURT:

The respondents, The Maumelle Company, *et al.*, respectfully request that This Court deny the Petition for Writ of Certiorari submitted by Petitioners, Charles Atteberry, *et al.*

STATEMENT OF THE CASE

Petitioners Charles Atteberry, *et al.* ("Purchasers") brought this action against Respondents, The Maumelle Company, *et al.* ("Seller") alleging violation of the Interstate Land Full Sales Disclosure Act (15 U.S.C. §1701 *et seq.*) ("the Act") and common law fraud. Seller moved for summary judgment by asserting that it was exempt from the Act by reason of the exemption contained in the Act (15 U.S.C. §1702(a)(2)) which provides that the Act shall not apply to a sale of land "under a contract obligating the Seller . . . to erect . . . a building thereon within a period of two years."

Purchasers contended that the contract did not obligate Seller to erect such a building within the meaning of the Act because the contract required Purchasers, if they chose to have a home built, to submit detailed plans and specifications consistent with the bills of assurance, and otherwise meeting the architectural requirements of the subdivision and to prove that they would and could pay for the lot and actual construction costs of Seller plus 10%, either by arranging for financing or other proof of ability to pay.

The United States District Court granted Seller summary judgment on the grounds that these conditions were merely reasonable steps in the actual construction process and that the building provision was sufficient to create the exemption relied upon by Seller.

In its opinion affirming the District Court, the Eighth Circuit Court of Appeals pointed out that the Act did not use the word "unconditional" before the words "obligating the Seller" and that the HUD guidelines for the Act expressly allowed such reasonable conditions on the Seller's obligation.

REASONS FOR DENYING THE WRIT

Purchasers Petition for Writ of Certiorari should be denied because it does not even come close to meeting any of the reasons This Court considers in exercising its discretion to grant or deny review on certiorari, as provided in Rule 10 of This Court. The decision of the Eighth Circuit was based upon the particular contract signed by Purchasers, governed by Arkansas law, and not even a single, similar contract has been the subject of any litigation cited by Purchasers of which the Seller is aware.

The decision of the Eighth Circuit, therefore, did not "conflict with the relevant decision of This Court" nor a "conflict with the decision of another United States court of appeals", nor "in any way conflict with a decision by a state court of last resort."

Further the decision of the Eighth Circuit is not a decision on an important question, federal or state, but

merely a decision on a particular contract provision that has never been the subject of reported litigation before. The contract provision was found by both the Eighth Circuit and the District Court to merely involve "reasonable steps in the actual construction process." The well-reasoned decision of the Eighth Circuit has certainly not "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the District Court, as to call for an exercise of This Court's supervisory power."

Not only is the question argued by Purchasers not an important one, with due respect, the position of Purchasers is a rather absurd argument that Seller cannot require the Purchasers to prove they can pay for the lots and, if they choose to have homes built, to pay for the homes also, and submit sets of plans and specifications which comply with the building requirements of the subdivision.

Equally absurd, with due respect to Purchasers, is the argument of Purchasers that the requirement of the Act that **Seller** be obligated to construct the building is not met because the **Purchasers** have the option to decide to build or not build.

The District Court and the Eighth Circuit both found that the provisions of the building contract were reasonable and enforceable under Arkansas law, giving the Purchasers full remedies provided by Arkansas law, including specific performance or damages or "any other remedies provided by law." Both the District Court and the Eighth Circuit found that the "cost plus 10%" contract

for construction of a residence was reasonable and enforceable under Arkansas law.

The HUD guidelines, 24 C.F.R. pt. 1710 app. A at IV(b) for the Act expressly allow such reasonable conditions as Purchasers now argue do not qualify because they argue the Seller's obligation to erect the home must not contain even reasonable conditions such as are involved in this case. The few courts which have used the words of an "unconditional obligation" in disallowing particular provisions inserted by sellers have also in the same cases referred to the term "illusory" or not "bona fide" obligations which were present on the facts with which the courts were dealing.

In most of the cases cited by Purchasers in their petition, the seller had severly limited the remedies of the purchasers such as, for example, merely return of deposit, no specific performance or no damages. No court has been presented with such reasonable conditions in the actual construction process, with Purchasers having full remedies, which are involved on the particular facts of this case.

In their petition, Purchasers repeatedly attempt to make an issue of the fact that the Eighth Circuit is the only court which has ever held that the Act did not require an "unconditional" obligation. All the Eighth Circuit said was that the Act does not use the word "unconditional" before "obligating." The Act simply provides that a contract be entered into "obligating the seller . . . to erect a building thereon within a period of two years."

The HUD guidelines interpreting the Act use a modifying word before "obligating", but that word is "specifically" obligating. The guidelines further provide, as

quoted by the Eighth Circuit in its opinion, that the very complaints made by Purchasers before This Court that the contractual provisions inserted impermissible conditions are approved by HUD in its guidelines. HUD guidelines specifically provide, contrary to the argument of these Purchasers before This Court:

> Use of a contract that obligates **buyer** to build within two years would not exempt the sale. (Emphasis added.)

The language of the statute, of course, is that it is the seller who is to be obligated, not the buyer. Otherwise the Act would not make any sense. Certainly a purchaser should not be forced to build a house he does not want to build.

The Eighth Circuit pointed out in detail, HUD guidelines specifically address several of the very complaints of Purchasers before This Court and otherwise the contract provisions were reasonable. As the Eighth Circuit pointed out:

> Even so, plaintiffs and the *amicus curiae* argue strenuously that the building provision in the present case injects contingencies into the building process that negate the operation of the §1702(a)(2) exemption. "[T]he Defendants' duty to build on the lot was contingent upon the buyer submitting plans which satisfied the Defendants. It was also contingent upon the buyer paying all of the seller's costs and expenses plus a surcharge of ten percent (10%)." Brief of Appellant at 20. Taking the second part first, it seems to us that this "contingency must be characterized as a [p]rovision[ ] for purchaser financing" and thus, according to the HUD

guidelines, a matter "to be decided by the parties to the contract under the laws of the jurisdiction in which the construction project is located." . . . Thus the guidelines themselves adopt the position that a provision for purchaser financing is not the sort of contingency that defeats the statutory exemption. Moreover, Plaintiffs do not suggest that construction contracts based on cost plus ten percent are in any way contrary to Arkansas law.

The submission of architectural plans is a closer call. It is not correct, however, as plaintiffs argue, that approval of the plans is at the unfettered will of the seller. According to the language of the building provision, the buyer submits plans "consistent with the Bills of Assurance, and otherwise meeting the architectural requirements of the subdivision." Thus the contract creates an objective standard by which the plans the buyer submits are to be evaluated by the seller. The question is whether this allows "nonperformance by the seller at the seller's discretion." . . . We think it does not. Arkansas case law is clear that contracts are to be construed reasonably so as to carry out the intentions of the parties. . . . Further, when conditions are placed on a contract, the parties have a duty to make a reasonable effort and to accept reasonable terms in order to satisfy these conditions. . . . The building provision therefore cannot properly be regarded as an invitation for the seller to evade its contractual obligation at will. This conclusion is supported by the fact that the building provision gives the buyer the remedy of specific performance as an alternative

> to damages or other remedies for breach of contract, thus emphasizing that the provision contemplates a binding obligation on the part of the seller.
>
> In sum, we agree with the trial court that "the 'conditions' cited by plaintiffs [are] reasonable steps in the actual construction process" and do not "negate the rights of the purchasers." . . . We conclude that the building provision is sufficient to make defendants eligible for the §1702(a)(2) exemption.

None of the cases relied upon the Purchasers in This Court even come close to holding that the particular contract of Seller in this case disqualifies Seller from the exemption.

Purchasers cite only one other court of appeals decision in support of their position, the decision of the Third Circuit Court of Appeals in *Markowitz v. Northeast Land Co.*, 906 F.2d 100 (Third Cir. 1990). Purchasers concede in their petition, pages 4 and 5, that the Third Circuit only mentioned the word "unconditional" requirement in describing Purchasers' **argument,** without ever mentioning the word "unconditional" again in reaching its decision. The Third Circuit did not ever state that the Act required an "unconditional" obligation. To the contrary, the Third Circuit in *Markowitz* repeatedly referred to the sellers' obligation in that case **not as being unconditional** but as being **"illusory."**

Purchasers also cite in support of their position the decision of the United States District Court for the Southern District of Florida, Miami Division, in *Schatz v. Jockey Club Phase III, Ltd.*, 604 F.Supp. 537 (S.D.Fla. 1985). Rule

10 of This Court does not include a conflict with a decision of a United States district court as a reason for granting certiorari. Even so, the Florida District Court decision is in no way in conflict with the decision of the Eighth Circuit in this case. The particular provision involved in the *Schatz* case was a limitation of the purchaser's remedies to a mere return of the purchaser's deposit together with interest thereon. The contract specifically provided that no action of specific performance would lie in favor of the purchaser and further provided that the seller reserved the right to reject the Purchaser for any reason whatsoever and, if so, "this contract shall be terminated and of no force or effect." The District Court properly concluded that such provisions "so qualifies the seller's promise to erect the unit within two years that it cannot be said that the contract 'obligates' defendant to do so within the meaning of the Act."

To the contrary, the contract provision in the present case specifically grants the right to Purchasers of specific performance or to recover damages or "any other remedies provided by law", and this fact was pointed out in the present case by both the District Court and the Eighth Circuit.

Likewise, while some of the state court decisions cited by Purchasers in their petition did use the word "unconditional" as qualifying the term "obligation" in the Act, on the facts of each case the state courts were dealing with, the obligation of the sellers in the particular contracts were described as being "illusory" or not "bona fide."

Four of the state court decisions cited by Purchasers were from the courts in Florida, only one of which was from the Supreme Court of Florida, the state court "of last resort". Only conflicts on important questions by state courts of last resort are considerations to consider in granting or denying petitions for certiorari under Rule 10 of This Court.

In *Samara Development Corp. v. Marlow,* 556 So.2d 1097 (Fla. 1990), the Supreme Court of Florida did use language that the contract was to "unconditionally" obligate the developer to complete construction within two years, but the court was again dealing with another case in which the contract, unlike the contract in the present case, so severely limited the purchaser's remedies that the contract was again found by the Court to be "illusory". The Seller's contract in the present case expressly gives Purchasers the right to specific performance or to recover damages in addition to all other remedies provided by law.

The remaining Florida cases cited by Purchasers were not state courts of last resort required by Rule 10 of This Court. In *Hamptons Development Corporation of Dade v. Sackler,* 522 So.2d 1035 (Fla. App.Third Dist. 1988), the court did use the language of "unconditional commitment" by the seller to complete the construction within a two year period. However, the court was also dealing with a case, and so held, in which the limitation of the purchaser's remedy made the seller's obligation "illusory". The contract involved in *Hamptons* limited the purchaser's rights as follows:

> It (the seller) cannot guarantee the firm completion and availability date within the aforedescribed two year time limit for completion as to any uncompleted condominium unit.

In the present case, the Seller's contract expressly obligated the Seller to complete within two years, rather than "estimating", completion within two years.

Another decision of a lower court of appeals in Florida, *Arvida Corporation v. Barnett*, 502 So.2d 11 (Fla. App. Third Dist. 1986), did use the language of "unconditional commitment" on the part of the seller to complete construction within two years, but it was dealing with a contract which provided "the only remedy against you (the seller) for your default is to obtain a refund of my deposit (without interest). I will have no right of specific performance. . . . " The contract further provided the buyer could not seek "damages in the event of Arvida's default."

In its conclusion, the Florida Court did not use the words "unconditional" but rather "bona fide obligation". The lower court in the state of Florida held:

> We conclude that the trial court correctly ruled as a matter of law that the instant agreement fails to meet the **statutory requirement of a bona fide obligation** to construct within two years.

The third decision of a lower state court in Florida cited by Purchasers is *Dorchester Development, Inc. v. Burk*, 439 So.2d 1032 (Fla.App.Third Dist. 1983). That court did use the language of "unconditional" commitment in the course of its opinion, but it was dealing with a contract

which, unlike the present contract, limited the purchasers' remedies to "give the purchasers an option to cancel the contract and receive back their deposits." On its facts, this was thus another "illusory" unreasonable condition on the Seller's obligation.

The only other state court decision cited by the Purchasers was from Alabama, *N & C Properties v. Windham*, 582 So.2d 1044 (Ala. 1991). Again, the Alabama court did use the language, quoting from the Florida decisions previously cited, of an "unconditional" commitment on the part of the seller. Again, however, the court had before it a case in which the obligation to erect a building, unlike the contract in the present case, was illusory or unreasonable. The contract stated "that in the event the units are not completed by the date established, each party shall be relieved of all obligations to the other and the Windhams' deposit will be refunded."

CONCLUSION

The Eighth Circuit Court of Appeals correctly held that Purchaser's contracts in this case imposed only **reasonable conditions** on the obligation of Seller, such as for Purchasers to pay for the lot and house and to build the house in accordance with the subdivision regulations. The Eighth Circuit's decision is thus in accordance with the HUD guidelines interpreting the Act and is not contrary to the decision of other circuit court of appeals' decision, or even any U.S. district court or even any state court of last resort or a lower state court. The Eighth Circuit did state that the Act should be **interpreted** to

read that the obligation did not need to be "unconditional", but merely accurately pointed out that the Act does not use the word "unconditional" at any place. The Eighth Circuit then pointed out that the guidelines of HUD on their fact expressly allows reasonable conditions.

On the particular factual circumstances of this case, including the very firm obligation contained in the contract presented to the U. S. District Court and the Eighth Circuit Court of Appeals imposing heavy obligations on the Seller, the decision of the Eighth Circuit Court of Appeals not only is not contrary to any other court decision in this nation, but it is the correct decision that any other court should reach when presented with the particular contract and other facts of this case.

Respondents, the Maumelle Company, *et al.*, therefore, pray that This Court deny the petition for writ of certiorari.

Respectfully submitted,

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